

**United States Department of Labor
Employees' Compensation Appeals Board**

PAMELA E. CANADY, Appellant

and

**U.S. POSTAL SERVICE, BULK MAIL
CENTER, Dallas, TX, Employer**

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**Docket No. 04-1487
Issued: January 24, 2005**

Appearances:
Pamela E. Canady, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Alternate Member
MICHAEL E. GROOM, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On May 17, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated February 13, 2004, which denied modification of the Office's April 24, 2003 decision. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office properly adjudicated the issue presented as a recurrence of disability rather than a modification of a wage-earning capacity.

FACTUAL HISTORY

On November 17, 1998 appellant, then a 27-year-old distribution clerk, filed a traumatic injury claim alleging that she was keying and felt a sharp pain in her lower right forearm.¹

¹ On December 18, 1998 appellant, filed an occupational disease claim alleging that she developed tendinitis in the left hand because she was unable to use her right hand. This claim was accepted by the Office as a consequential injury.

Appellant stopped work on November 17, 1998 and was released to full duty on November 22, 1998. The Office accepted appellant's claim for tenosynovitis of the wrist and tears of both wrists. The record reflects that appellant stopped work intermittently from November 28, 1998 to February 2, 1999 and returned to limited duty on February 4, 1999.² On May 10, 1999 appellant was placed on the periodic rolls. Appellant returned to a modified light-duty position full time on September 4, 1999.³

In a decision dated December 13, 2002, the Office found that appellant's actual earnings in her limited-duty position as a bulk mail distributor, with weekly earnings of \$867.32 per week, fairly and reasonably represented her wage-earning capacity effective August 15, 2001. In determining that the position was medically suitable, the Office found that appellant had demonstrated the ability to perform the job for two months or more and the position was considered suitable to appellant's partially disabled condition. The Office found that appellant's actual earnings met or exceeded the current wages of the job she held when injured and advised that appellant's wage-loss compensation ended on the date she was reemployed with no loss of wage-earning capacity.

In a January 23, 2003 disability certificate, Dr. Olayinka Ogunro, a Board-certified orthopedic surgeon, advised that appellant was unable to work from January 18 to 23, 2003 and could return on January 24, 2003.

In a telephone memorandum dated February 10, 2003, the Office noted that appellant called and advised that she was no longer working, that her job was no longer available and that her condition had worsened. Appellant was advised to file a recurrence claim.

On March 3, 2003 appellant filed a claim for a recurrence of disability due to the November 17, 1998 work injury for which she stopped work on February 12, 2003. In an accompanying letter dated March 7, 2003, appellant also alleged that she suffered a recurrence on January 22, 2003 while replacing labels on containers, as her shoulder started hurting.⁴ In disability certificates dated March 6 and 7, 2003, Dr. Ogunro indicated that appellant was unable to return to work and needed retraining.

In a March 6, 2003 memorandum, Lucinda Lockett of the employing establishment advised that appellant requested retraining that date. She noted that appellant's physician did not take her off work, and explained that the work offered to appellant was within appellant's

² On February 16, 1999 appellant underwent surgery on the right wrist and on May 4, 1999 she underwent surgery on the left wrist.

³ By decision dated December 2, 1999, the Office granted appellant a schedule award for a seven percent permanent impairment of her right arm and a four percent permanent impairment of her left arm. By decision dated October 23, 2001, the Office granted appellant an additional schedule award for a 10 percent permanent impairment of her right arm and a 12 percent permanent impairment of her left arm.

⁴ She enclosed a January 28, 2003 CA-17 form from Dr. Ogunro, who diagnosed carpal tunnel, cubital tunnel and tennis elbow and opined that appellant could return to work within certain restrictions. Also submitted were various copies of medical reports from November 1998 to March 7, 2003.

limitations, yet appellant refused to return. She indicated that appellant had been off work since February 12, 2003.

By letter dated March 17, 2003, the Office advised appellant of the additional factual and medical evidence needed to establish her claim for a recurrence of disability.

By decision dated April 29, 2003, the Office denied appellant's claim on the grounds that the medical evidence was insufficient to establish that she sustained recurrences of disability from January 24 to 29, 2003 and from February 12, 2003 and continuing, causally related to the accepted injury.

By letter dated April 3, 2003, appellant explained that her shoulders had worsened since the original injuries and that she now had tendinitis in her right shoulder with tenderness in the left. She referred to Dr. Ogunro's reports and indicated that it was her doctor's opinion that her modified job had worsened her injury.

By letter dated May 6, 2003, appellant requested reconsideration and provided additional medical evidence. The additional medical evidence included a January 23, 2003 report, in which Dr. Ogunro diagnosed carpal tunnel syndrome, cubital tunnel syndrome bilaterally, status post release and indicated that appellant appeared to have tendinitis in the right shoulder. Additionally, in an April 25, 2003 report, Dr. Ogunro noted appellant's symptoms and opined that appellant's shoulder pain evolved from her bilateral upper extremity tendinitis, which evolved into carpal tunnel syndrome and cubital tunnel syndrome bilaterally with symptoms in reference to her shoulders and elbows bilaterally. The physician attributed appellant's findings of tendinitis in the elbow and shoulders to her employment and advised reassigning appellant.

By decision dated May 23, 2003, the Office denied modification of the April 29, 2003 decision.

By letter dated June 5, 2003, appellant requested reconsideration and provided additional medical evidence. The additional medical evidence was comprised of a report filled out for the Office of Texas Workers' Compensation dated June 4, 2003 from Dr. Ogunro advising that appellant could not perform her modified job as of February 10, 2003. In a separate report dated June 4, 2003, Dr. Ogunro opined that appellant was taken off work because she was unable to perform her modified duties.

By decision dated July 1, 2003, the Office denied appellant's request for reconsideration finding that she failed to submit either new and relevant evidence or legal contentions not previously considered.

Dr. Ogunro continued to opine that appellant could not perform her modified duties in reports dated June 4 and August 27, 2003. However, on October 22, 2003, Dr. Ogunro advised that appellant had a normal examination and could return to work.

In a November 6, 2003 fitness-for-duty report, Dr. Arthur L. Sarris, a Board-certified orthopedic surgeon, opined that there was no reason why appellant could not return to her modified duties.

In a November 26, 2003 report, Dr. Ogunro diagnosed tendinitis of both shoulders and indicated that appellant was not at work because of “confusion” over Office requirements. The doctor recommended a second opinion examination.

By letter dated December 17, 2003, appellant requested reconsideration and provided additional medical evidence. She enclosed copies of previously submitted reports and indicated that her duties had changed and that the job she was given on return to work in 2001 was no longer available.

By decision dated February 13, 2004, the Office denied modification of the prior decision. The Office determined that there was no medical evidence supporting a recurrence of disability beginning January 23 or February 12, 2003.

LEGAL PRECEDENT

A wage-earning capacity decision is a determination that a specific amount of earnings, either actual earnings or earnings from a selected position, represents a claimant’s ability to earn wages. Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.⁵

The Office’s procedure manual provides that, “[i]f a formal loss of wage-earning capacity decision has been issued, the rating should be left in place unless the claimant requests resumption of compensation for total wage loss. In this instance the CE [claims examiner] will need to evaluate the request according to the customary criteria for modifying a formal loss of wage-earning capacity.”⁶

Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated, or the original determination was, in fact, erroneous.⁷ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁸

ANALYSIS

The Office developed the evidence and adjudicated the issue as to whether appellant established a recurrence of disability on January 23 and February 12, 2003. Under the circumstances of this case, however, the Board finds that the issue presented was whether the December 13, 2002 wage-earning capacity determination should be modified.

⁵ See *Katherine T. Kreger*, 55 ECAB ____ (Docket No. 03-1765, issued August 13, 2004); *Sharon C. Clement*, 55 ECAB ____ (Docket No. 01-2135, issued May 18, 2004).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995).

⁷ *Sue A. Sedgwick*, 45 ECAB 211 (1993).

⁸ *Id.*

Appellant returned to work at the employing establishment on September 4, 1999 to a modified light-duty position within her restrictions. She was subsequently employed in a limited-duty position on August 15, 2001 as a bulk mail distributor and continued in this position and, in a December 13, 2002 decision, the Office found that appellant's actual wages fairly and reasonably represented her wage-earning capacity such that she no longer had any loss of earning capacity. Appellant filed a notice of recurrence of disability on March 3, 2003 alleging disability beginning February 12, 2003. In an accompanying letter, she also alleged recurrent disability beginning January 23, 2003. In a memorandum of telephone call dated February 10, 2003, appellant alleged that her job was no longer available, and her condition had worsened such that she was no longer working. She also provided treatment notes from her physician indicating that she was unable to return to work.

It is clear that the claim in this case was that appellant's condition had deteriorated such that she was having difficulty working in the modified position, which had been compatible with her wage-earning capacity, for the foreseeable future. The Board has held that, when a wage-earning capacity determination has been issued, and a claimant submits evidence with respect to disability for work, the Office must evaluate the evidence to determine if modification of wage-earning capacity is warranted.⁹

As noted above, the Office's procedure manual directs the claims examiner to consider the criteria for modification when the claimant requests resumption of compensation for "total wage loss." If there is a claim for disability that would prevent a claimant from performing the position that was the basis for a wage-earning capacity decision, then clearly there is an issue of whether modification is appropriate. In this case, appellant submitted some evidence that she was disabled from her modified position. The Board finds that the Office should have considered the issue of modification of the wage-earning capacity determination.

CONCLUSION

The Board finds that appellant's claim for compensation raised the issue of whether a modification of the December 13, 2002 wage-earning capacity decision was warranted and the case must be remanded for an appropriate decision on this issue.

⁹ See *Katherine T. Kreger* and *Sharon C. Clement*, *supra* note 5. The Board notes that consideration of the modification issue does not preclude the Office from acceptance of a limited period of employment-related disability, without a formal modification of the wage-earning capacity determination. *Kreger*, *supra* note 5; *Cf. Elsie L. Price*, 54 ECAB ____ (Docket No. 02-755, issue July 23, 2003) (acceptance of disability for an extended period was sufficient to establish that modification of the wage-earning capacity determination was warranted).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 13, 2004 is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: January 24, 2005
Washington, DC

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member